APPEAL NO. 022742
FILED DECEMBER 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 2, 2002. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) did not sustain a compensable injury; that the date of injury for the alleged repetitive trauma injury is _____; that the claimant gave timely notice to his employer of the alleged injury; and that since the claimant did not sustain a compensable injury, he did not have disability. Both parties have appealed. The claimant appeals the compensable injury and disability determinations, arguing that the hearing officer applied the wrong standard in determining the compensability issue. The claimant maintains repetitious trauma injuries may be proven solely by lay testimony and do not require expert testimony to establish a causal connection within reasonable medical probability. The respondent/cross-appellant (carrier) responds, arguing there is sufficient evidence to support the compensability and disability determinations. The carrier appeals the determinations regarding date of injury and timely reporting, arguing that these determinations are so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust. The claimant urges affirmance of the challenged determinations in his response.

DECISION

Affirmed in part and reversed and remanded in part.

DATE OF INJURY AND TIMELY REPORTING

An "occupational disease" is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . . The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). A "repetitive trauma injury" is "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. The hearing officer found that the date of injury was _____, when a doctor suggested to the claimant that his employment might be related to his low back injury. Conflicting evidence was presented on this issue. We conclude that the hearing officer's determination on the date of injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer's determination on the date of injury is affirmed. Section 409.001(a)(2) provides that an employee shall notify his employer of any injury not later

than the 30th day after the date on which, if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment. The parties stipulated that the claimant reported the claimed injury to the employer on April 9, 2002. Given our affirmance of the date of injury determination, we likewise affirm the timely reporting determination.

COMPENSABILITY AND DISABILITY

The claimant had the burden to prove that he sustained a compensable repetitive trauma injury and had disability. We have previously stated that where the subject of an injury is not so scientific or technical in nature to require expert evidence, lay testimony and circumstantial evidence may suffice to establish causation. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992.

In Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992, the hearing officer determined that the claimant in that case sustained a repetitive trauma injury to her back while working as a driver for a parcel delivery service. The Appeals Panel cited Texas court decisions; stated that the courts have held that to recover for a repetitive trauma injury the employee must not only prove that the repetitious physically traumatic activities occurred on the job, but must also show that a causal link existed between the traumatic activity and the injury, that is, that the disease must be inherent in the type of employment as compared with employment generally; noted that generally, injury and disability may be established by lay testimony of the claimant alone; said that there is a narrow exception requiring expert testimony where a claimant asserts that his injury aggravated cancer or a disease, or when an injury to a specific part of the body is alleged to have caused damage to another unrelated body part; rejected the carrier's argument that the claimant's surgeon's statement that her work-related activities could have caused a ruptured disc was insufficient medical evidence and that only expert medical evidence was probative of such causation; and affirmed the decision of the hearing officer. When expert medical evidence is required, the form of the expert medical evidence is not as important as is the substance of it and the use of "reasonable medical probability" is not required. Texas Workers' Compensation Commission Appeal No. 951417, decided October 9, 1995.

The hearing officer noted specifically in his Statement of the Evidence that "since the causal connection between the claimant's employment and the alleged injury are not within common experience, the hearing officer looks to the expert witness statements to see if it is within reasonable medical probability that the two are connected." This statement indicates the hearing officer is requiring expert medical evidence to establish causation which is a higher standard of proof than is required. Texas Workers' Compensation Commission Appeal No. 991195, decided July 15, 1999 (Unpublished). We have previously stated that where the subject of an injury is not so scientific or technical in nature as to require expect evidence, lay testimony and circumstantial evidence may suffice to establish causation. Texas Workers' Compensation Commission Appeal No. 92187, *supra*. In the case at issue, expert

testimony is not required as we do not consider the question of causation to be beyond common knowledge. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

We reverse the compensability determination for the hearing officer to reconsider the existing record and apply the correct standard of proof consistent with this decision. Since the issue of compensability has not been resolved, we must reverse and remand the issue of disability for the appropriate conclusion of law, based upon whether the hearing officer determines that the claimant sustained a compensable injury. In reversing, we do not imply that a hearing officer may not consider medical evidence in "common knowledge" cases, and such evidence may be material in deciding the ultimate issue, but medical evidence is not required.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **UNITED STATES FIDELITY AND GUARANTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge